IN THE HIGH COURT OF SIKKIM

ORDER SHEET

Criminal Appeal ..... No. 17 of 1999/ 2003

.....Sanjay Subba.....Petitioner/Appellant

Versus

State of Sikkim .....Respondent

Serial No. of Order	Date of Order	Order with Signature	Office Note as to action (if any) taken on Order
1.	27.11.2003	Heard Shri N. Rai, learned Counsel for the appellant. Admit. Issue notice. Call for the lower court records. There shall be stay of realisation of fine till the disposal of the appeal. Paper book may be prepared within 6 weeks. Put up for fixing date of hearing immediately after preparation of paper book. N.S. Singh / RKP (N. S. Singh) Judge 27.11.2003 (R. K. Patra) Chief Justice 27.11.2003	Trial Court record called for on 28-11-03. 28/11/03
at/ 2.	15.12.2003	As agreed to by the learned Counsel for the parties, list this case for hearing on 3.3.2004. N.S. Singh / RKP (N. S. Singh) Judge 15.12.2003 (R. K. Patra) Chief Justice 15.12.2003	
at/			

Serial No. of Order	Date of Order	Order with Signature	Office Note as to action (if any) taken on Order
3.	3.3.2004	Heard in part. Put up on 5.3.2004 for further hearing. N.S. Singh (N. S. Singh) Judge RKP (R. K. Patra) Chief Justice	
	at/		
4.	5.3.2004	Heard arguments. Judgment reserved. N.S. Singh (N. S. Singh) Judge RKP (R. K. Patra) Chief Justice	
	at/		
5.	9.3.2004	Judgment delivered vide separate sheets. The conviction of the appellant is converted from 302 IPC to one under section 304 part II IPC. He is sentenced to undergo rigorous imprisonment for five years. The appellant will be entitled to the benefits of set off as provided under section 428 Cr.P.C. The appeal is allowed in part. N.S. Singh (N. S. Singh) Judge RKP (R. K. Patra) Chief Justice	A certified copy of Judgment forwarded to State Jail, Rourkela on 12-3-04. Record & trial Court forwarded on 12.3.04 Lodges 12/3/04
	at/		

THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 17 OF 2003

In the matter of an appeal against conviction.

Sanjay Subba,
S/o Late Hem Subba,
R/o Below State Jail Rongyek,
P.S. Gangtok,
East Sikkim
(At present in Rongyek Jail) .... **Appellant**

VERSUS

State of Sikkim .... **Respondent**

For the appellant : Shri N. Rai, Advocate.

For respondent : Shri J. B. Pradhan, Additional Public Prosecutor assisted by Shri Karma Thinly, Government Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 9th March, 2004.

J U D G M E N T

R. K. PATRA, C.J.

This appeal is directed against the judgment and order dated 22nd October, 2003 passed by the Sessions Judge (Special Division – II), Sikkim at Gangtok in Criminal Case No. 5 of 2002 by which the appellant stands convicted under section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- (Rupees five thousand) with defaulting clause of imprisonment.

2. The prosecution case is as follows :

On 16th September, 2001, there was a football match between Decheling and Rongneck (Junior) teams at Chongey School ground. The match was won by Rongneck (Junior) team. After the match, there was some scuffle between the teams in which the accused Dawa Tamang (since acquitted under section 232 Cr.P.C.) was assaulted by some members of Decheling team and the matter was settled at the intervention of the appellant. On the date of occurrence (18th September, 2001) the juvenile accused Vikram and Binoy while returning to their house after the school, were assaulted by some boys of Decheling. On hearing this, the appellant who is the brother of the aforesaid juveniles came to Decheling along with accused Dawa Tamang (as already noted acquitted under section 232 Cr.P.C.) with a view to discuss and settle the mis-understanding among the boys. On reaching Decheling, the appellant searched the boys who had assaulted his two brothers. In the meantime, Sangay Paljor Bhutia (hereinafter referred to as the deceased) along with some other boys came for discussion with the appellant and there ensued hot discussions which later resulted in a scuffle. During the scuffle, the appellant stabbed the deceased with a knife and fled away towards Rongneck. The victim was immediately taken to STNM hospital by his

relatives but he succumbed to his injuries on the way to the hospital.

3. It may be noted that the appellant and accused Dawa Tamang (since acquitted under section 232 Cr.P.C.) along with Vikram and Binoy were sent up for trial. Since Vikram and Binoy were juveniles, their case was made over to the Juvenile Justice Court. As such, the appellant and accused Dawa Tamang (since acquitted under section 232 Cr.P.C.) stood their trial.

4. In order to bring home the charge against the appellant, the prosecution examined as many as 20 witnesses out of whom PWs 2, 3 and 4 were the eye-witnesses to the occurrence. PW 16 is the doctor who conducted the post-mortem examination of the dead body of the deceased.

5. The plea of the appellant was one of denial.

6. The learned Sessions Judge relying on the ocular evidence of PWs 2, 3 and 4 held the appellant guilty under section 302 IPC and sentenced him as mentioned above.

7. It is not in dispute that the deceased had homicidal death. The doctor PW16 who conducted the autopsy on the dead body of the deceased found the following ante-mortem injuries:-

> 1. Spindle shaped incised penetrating wound 3.5 x 1 cm. cavity deep placed obliquely over the left side of chest in the mid axillary line in the

10th inter costal space with blood oozing out from the wound. The track moving upwards and medially causing incised through and through perforation of the lower lobe of the left lung and causing incised perforation of the pericardium and left ventrical measuring 3 x 1 cm.

2. Incised wound 3 x 1.5 x 5 cms. obliquely placed over the left hip.

3. Contused laceration 3 x .5 cms. scalp deep over the left occipital region of the scalp with bleeding.

4. Contused abrasion 3 x 1 cms. over the left knee.

5. Contused abrasion 3 x 2 cms. 1 cm. below injury No.2.

According to the doctor, the cause of death was internal haemorrhage following incised ante-mortem penetrating injury of the chest, lungs and heart produced by a sharp-edged cutting weapon. He further opined that the injuries were sufficient in the ordinary course of nature to cause death.

8. In view of the clear, categorical and clinching evidence of eye-witnesses (PWs 2, 3 and 4) corroborated by the evidence of the doctor, Shri Rai, learned counsel for the appellant rightly and fairly did not dispute that it was the appellant who did cause the death of the deceased by inflicting the stab injury. He however submitted that the offence committed by the appellant would come within the purview of section 304 part II IPC.

9. Before discussing the evidence of PWs 2, 3 and 4, the evidence of PW7 may be taken note of. He stated that appellant was a student of Enchey Secondary School at the relevant time whereas he (PW7) himself was a student of Rongney School. He further stated that he knew the other accused Dawa Tamang because they used to play football together for Decheling team and Chongey team respectively.

10. Let us now proceed to examine the evidence of the eye-witnesses of PWs 2, 3 and 4. PW2 stated that he returned to his village Decheling from Gangtok at about 4.30 p.m. on the day of the incidence. After sometime, the appellant and his friends came to his house being armed with iron rods and khukuries. He took them out of his house to the road. At that time, the appellant quarrelled with him. In the meantime, the deceased came. Thereafter a fight took place amongst them and during that fight the appellant stabbed the deceased with a knife and fled away. In his cross-examination, he stated that the mother of the appellant had already come to his house to complain that his (PW2's) younger brother Bikash (PW7) had earlier assaulted the younger brother of the appellant. In his evidence, PW2 candidly admitted that the appellant did not assault or abuse him.

PW3 is the cousin of the deceased. He stated that in the evening of the day of occurrence he saw the appellant

along with six to seven persons roaming around in Decheling. He saw the appellant threatening PW2 and he intervened and tried to separate them. In the meantime, the deceased arrived at the spot and enquired as to what was happening. At this moment, the appellant became angry and was about to hit the deceased with a rod but he prevented him from doing so. Thereafter the appellant took out a dagger and stabbed the deceased in the abdomen and ran away. In his cross-examination, it was brought out that the appellant was a student of Class X in Enchey Secondary School. He further stated that when he tried to separate the appellant from PW2, the former (appellant) told him that the brother of PW2 had beaten his younger brother. He also stated that when he reached the spot and separated the appellant from PW2, only verbal duel was going on between them.

PW4 is the brother of the deceased. He stated that on the date of occurrence at about 5.30 p.m. when he came out his house he saw the appellant fighting with the deceased. He stated that he saw the deceased giving a slap to the appellant. He also saw the appellant hitting the deceased with iron rod on his hand. In course of the fighting that took place, the appellant took out a knife from his socks and stabbed on the abdomen of the deceased with it. In the cross-examination, he admitted that he did not know as to

why the appellant and the deceased were fighting. In his cross-examination, he stated that the deceased gave slaps, kicks and blows to the appellant as a result of which the appellant fell down on the ground.

11. From the aforesaid analysis of evidence of PWs 2, 3 and 4, it may be seen that the appellant had gone to Decheling busty to settle the score with PW2 because earlier his younger brother was beaten by the brother of PW2. There is nothing on record to suggest that the appellant had any previous enmity with the deceased. When hot discussion was going on between the appellant and PW2, the deceased arrived at the spot and enquired as to what was going on and there ensued sudden fight amongst them. At this moment the appellant took out the knife and with it inflicted one blow on the abdomen of the deceased. The appellant did so without pre-meditation in a sudden fight in the heat of passion following sudden quarrel. It was all at the spur of the moment. Taking into consideration the totality of the circumstances, we are inclined to hold that the instant case falls under exception 4 to section 300 IPC. The appellant had no intention to cause the death of the deceased. He had also no intention to cause such bodily injury as was likely to cause death. It cannot however be disputed that the act of the appellant resulting in the injuries to the deceased was done with the knowledge that it

was likely to cause his death. The offence accordingly would fall under section 304 part II IPC.

12. For the reasons mentioned above, we convert the conviction of the appellant from 302 IPC to one under section 304 part II IPC. Ends of justice would be met if he is sentenced to undergo rigorous imprisonment for five years. The appellant will be entitled to the benefits of set-off as provided under section 428 Cr.P.C. We order accordingly.

13. The appeal is allowed in part.

(R. K. Patra)
Chief Justice
09.03.2004

I agree.

(N. Surjamani Singh)
Judge
09.03.2004